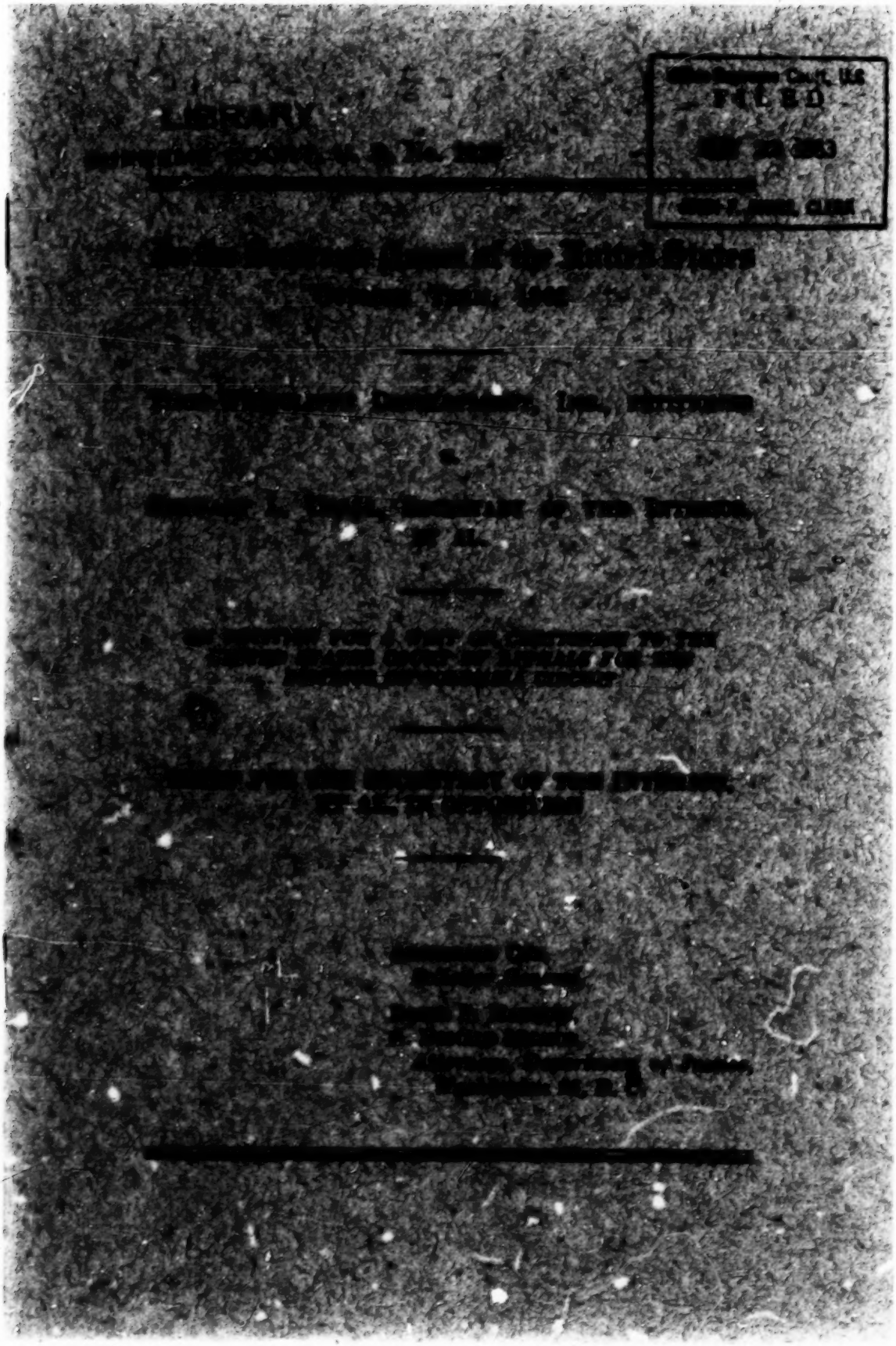

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 1035

THOR-WESTCLIFFE DEVELOPMENT, INC., PETITIONER

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECRETARY OF THE INTERIOR, ET AL., IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 17-22) is reported at 314 F.2d 257. The district court did not write an opinion.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1963 (Pet. App. 23). The petition for a writ of certiorari was filed on April 19, 1963.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a statutory provision requiring issuance of non-competitive oil and gas leases on public lands to "the person first making application who is qualified to hold a lease" is violated by a regulation of the Secretary of the Interior which treats as simultaneously filed all lease offers filed within a five-day period.

STATUTE AND REGULATION INVOLVED

Section 17 of the Mineral Leasing Act of 1920, 41 Stat. 443, as amended, 30 U.S.C. (Supp. IV) 226(c), and 43 C.F.R. 192.43(a) and (b) are set forth at pp. 2-3 of the petition.

STATEMENT

Petitioner brought this suit against the Secretary of the Interior seeking a declaration of its rights to lease, under the Mineral Leasing Act of 1920, 41 Stat. 437, as amended, 30 U.S.C. 181 *et seq.*, certain lands in the public domain located in Wyoming, Utah and New Mexico (Jt. App. 3-15).[1] The lands involved were subject to oil and gas leases which expired by operation of law on June 30, 1961, at the end of their terms (Jt. App. 4-5, 6, 7). Petitioner filed its offers to lease these lands on July 3, 1961, the first time the land offices for New Mexico, Utah and Wyoming were open after the expiration

[1] Jt. App. refers to the joint appendix printed in the court of appeals.

of the previous leases (Jt. App. 5, 6-7, 8). The subordinate officials of the Department of the Interior, acting in accordance with the controlling regulation, 43 C.F.R. 192.43, rejected these offers on the ground that the regulation provides that lands in leases which expire at the end of their terms become available for further leasing only after the description of such lands has been posted on the land office bulletin board[2] (Jt. App. 5-6, 7, 8, 58-61). The lands involved in this case were first open to simultaneous filing from July 17, 1961, to July 24, 1961 (*ibid.*). Petitioner filed no application during this period, and other applicants were eventually found to be entitled to leases.

In its suit for declaratory judgment, petitioner asked that the regulation be declared invalid, that the lands be declared available for leasing on July

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[2] Prior to the adoption of the current regulation, 43 C.F.R. 192.43, in December 1959, lands covered by leases which expired at the end of their terms generally became available for new lease offers the next day the land office was open for business. See *Wright* v. *Paine*, 289 F.2d 766 (C.A. D.C.). Where leases were cancelled, voluntarily relinquished or terminated by operation of law for failure to pay rent, the lands became available for new offers only after notation of the cancellation, relinquishment or termination on the official records of the land office (Jt. App. 39-40).

[3] In substance, this regulation provides that on the third Monday of each month there will be posted on the bulletin board of each land office a list of lands on which leases expired, were cancelled, relinquished, or terminated and which will become available for leasing on the fifth working day thereafter. These lands are subject to simultaneous filings of lease offers from the time the notice is posted until the fifth day. If more than one offer is filed in this period, the priorities are determined by a public drawing.

3, 1961, and that petitioner be declared the first qualified applicant (Jt. App. 13-14). On cross-motions for summary judgment, the district court dismissed the petitioner's suit with prejudice (Jt. App. 113-114). The court of appeals affirmed on the ground that it was within the authority of the Secretary to promulgate a regulation implementing the statutory language "person first making application,"[1] and that the regulation, 43 C.F.R. 192.43, was neither unreasonable nor inconsistent with the plain language of the Mineral Leasing Act, having in mind the purpose of the statute and the experience of the Secretary in its administration.

ARGUMENT

Section 17(a) of the Mineral Leasing Act of 1920, as amended, 74 Stat. 782, 30 U.S.C. 226(a), provides that lands on the public domain which are known or believed to contain oil or gas deposits may be leased by the Secretary. Whether to lease or not is entrusted to his discretion. *United States ex rel. McLennan* v. *Wilbur*, 283 U.S. 414. However, if the Secretary leases lands which are not within any known geological structure of a producing oil or gas field, the statute requires that he issue the lease to "the person first making application for the lease who is qualified to hold a lease * * *." Section 17(c), Mineral Leasing Act of 1920, as amended, 74 Stat. 782, 30 U.S.C. 226(c); *McKay* v. *Wahlen-*

[1] Sec. 17(c), Mineral Leasing Act of 1920, as amended, 74 Stat. 782, 30 U.S.C. 226(c). This is the same provision as the one involved in *Boesche* v. *Udall*, No. 332, this Term.

maier, 226 F.2d 35, 37 (C.A. D.C.). These are known as noncompetitive leases, *i.e.*, they are issued without competitive bidding at a fixed rental per acre, now usually 50¢ per acre per year. Section 17(d), Mineral Leasing Act, *supra*, 30 U.S.C. 226 (d). In his administration of the Mineral Leasing Act, the Secretary is generally authorized to prescribe necessary and proper rules and regulations to carry out and accomplish the purposes of the Act. Section 32, Mineral Leasing Act of 1920, 41 Stat. 450, 30 U.S.C. 189.

In executing this program, the Secretary has encountered serious problems in determining the "person first making application" for noncompetitive leases on lands which have previously been under lease. Such lands, even though they may not be on a producing structure, frequently have a speculative market value far in excess of the 50¢ per acre fee charged by the government. When the prior lease term is about to expire, there are many strategems which may be employed, both by the prior lessee and others, to secure the new lease.[*] The administrative problem is to give all interested applicants an equal chance to secure the new lease.

The Secretary's solution to the problem is the amended regulation, 43 C.F.R. 192.43, which (1)

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[*] Examples of devices used in the race to be first are found in *Miller* v. *Udall*, 307 F.2d 676 (C.A. D.C.), certiorari denied, 371 U.S. 967; *Signal Oil and Gas Company*, I.D. No. A-28626; *Margaret A. Andrews et al.*, 61 I.D. 9. Some of the administrative problems are described in the Hochmuth affidavit at Jt. App. 39-42.

withholds the lands from leasing and lease applications until notice of the expiration of the earlier lease is posted, (2) provides that all applications filed within five business days thereafter shall be regarded as having been filed simultaneously, and (3) provides that priorities among such filings shall be determined by public drawing. The petitioner seeks to invalidate the regulation on the ground that the statute requires the issuance of the new lease to the applicant who is first in point of time after the expiration of an existing lease and without regard to the posting of notice of availability which the regulation contemplates.

The court of appeals, in deciding this case, applied two legal principles. The first one is that the Secretary is entitled to issue regulations for determining who is "the person first making application," unless this statutory language is so definite as to render an interpretative or implementing regulation inappropriate. The court found the implementing regulation permissible. The application of this principle is in accord with the decisions of this Court. *Helvering* v. *Reynolds Co.*, 306 U.S. 110, 114; *Morrissey* v. *Commissioner*, 296 U.S. 344, 354-355.

The second legal principle is that regulations by an administrative agency in the field entrusted to its administration by Congress are to be upheld unless unreasonable or plainly inconsistent with the authorizing statute. This concept, expressed in slightly differing terms, is found throughout the decisions of this Court dealing with judicial review of administrative regulations. See, *e.g.*, *United States* v. *Shimer*, 367 U.S.

374, 381-382; *Fleming* v. *Mohawk Co.*, 331 U.S. 111, 116; *Commissioner* v. *South Texas Co.*, 333 U.S. 496, 501; *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 209 *et seq.*; *Fawcus Machine Co.* v. *United States*, 282 U.S. 375, 378. The court of appeals decided that the regulation which petitioner attacks is neither unreasonable nor inconsistent with the plain language of the Mineral Leasing Act.

Both courts below applied the correct legal principles to test the validity of the regulation. The decision below does not conflict with any decision of this Court or of any other court of appeals. There is no important question of federal law involved requiring determination by this Court. There is no conflict with state law. Accordingly, there is no occasion for further review.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1963.

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